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No. 90-1985

In The

Supreme Court of the United States

October Term, 1991

ALBANY INSURANCE COMPANY,

Petitioner,

vs.

ANH THI KIEU,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Did the Fifth Circuit correctly hold that state substantive law applies to decide whether misrepresentations in an application for marine insurance void the insurance policy?

II

Did the Fifth Circuit construe the meaning of Article 21.16 of the Texas Insurance Code in accordance with the Texas Supreme Court's analysis of the statute?

LIST OF PARTIES

The following are parties to this proceeding:

Albany Insurance Company
Plaintiff-Petitioner

Anh Thi Kieu
Defendant-Respondent

Sabine Offshore Service, Inc.
Intervenor-Respondent

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STATEMENT OF JURISDICTION

Respondent contends that no issues of importance are raised by Petitioner which necessitate this court's review. Further, the Fifth Circuit's opinion in this case does not conflict with any other Court of Appeals decision. The Fifth Circuit's construction of the state statutory law in this case does not conflict with the construction of such law by the Texas Supreme Court. Therefore, Respondent asserts that under Rule 10 of the Rules of the Supreme Court, this Court should not consider Petitioner's Petition For Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

STATEMENT OF THE CASE

In accordance with Rule 15 of the Rules of the Supreme Court, Respondent desires to expand upon the statement of the case as presented by the Petitioner.

Anh Thi Kieu, Respondent, is a Vietnamese immigrant who writes and speaks no English. She relied on Albany Insurance Company's agent, The Edgar Coco Agency, to assist her in filling out the application for insurance. There was no evidence at trial that she either knowingly or intentionally misrepresented any fact to the insurer. Michelle Vu, the Vietnamese translator who assisted Mrs. Kieu in filling out the application, stated that Mrs. Kieu appeared confused after the application was read to her. No evidence whatsoever was adduced at trial that Mrs. Kieu attempted to perpetrate a fraud in this case.

The trial court made a specific finding that no material misrepresentations were made by the vessel owner on the application for insurance. A surveyor for Albany Insurance Company surveyed the vessel shortly after the inception date of the policy and had full opportunity to observe the vessel and to inquire about any representations made on the application that Albany considered material.

Further, Anh Thi Kieu, the insured, is a resident of Texas. The vessel's home port is Port Arthur, Texas, and the insurance policy was brokered in Texas. The insurance application was filled out in the broker's offices in Port Authur, Texas. The accident causing the loss occurred in Texas waters off the coast of Port Arthur, Texas.

ARGUMENT

I.

Petitioner asserts that the Circuit Court erred in refusing to follow the doctrine of uberrimae fidei, which requires that the insured's misrepresentations in an application for insurance, even though innocent, void the insurance contract ab initio. Petitioner urges this Court to determine that the uberrimae fidei doctrine is entrenched federal precedent which must be applied in this case. If a well settled admiralty rule exists, then it must be applied in the construction of a maritime insurance contract. Federal admiralty law preempts inconsistent state law in such an instance. *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). If state and federal rules do not differ significantly, then the *Wilburn Boat* test does not come into play. In this case the preemption question need

not be addressed, or as other writers have aptly stated, "the Wilburn Boat need not be boarded"[1] because Texas state law is substantially similar to federal maritime law on this issue.

TEXAS AND GENERAL MARITIME LAW ON MISREPRESENTATIONS ARE SIMILAR

Under Texas state law a misrepresentation made with intent to deceive may void an insurance policy if the misrepresentation is material to the risk or contributes to the cause of the loss. *Robinson v. Reliable Insurance Co.*, 569 S.W.2d 28 (Tex. 1978). Under general maritime law any misrepresentation which is material to the risk can void an insurance policy, regardless of the insured's intent. *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987). The federal rule is more stringent in that intent to deceive is not required, but at least where the undisclosed risk is not material but contributes to the loss, Texas state law may void a policy where general maritime law would not. Nevertheless, both rules prevent an insured from collecting benefits if the misrepresentation is "material." *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882 at 887 (5th Cir. 1991). Since the fundamental nature of both rules is the same, and state law in this case is not *inconsistent* with the general maritime law, this court need not rule on whether the uberrimae fidei doctrine usurps Texas state law.

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[1] Several cases have discussed whether a preemption analysis applies in nautical terms. See *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d at 461 (5th Cir. 1982), vacated on rehearing on other grounds, 706 F.2d 1365 (5th Cir. 1983). *Albany Insurance Co. v. Wisniewski*, 579 F.Supp. (D.R.I. 1984).

MRS. KIEU'S VERDICT SHOULD BE UPHELD UNDER EITHER ANALYSIS

The Fifth Circuit's opinion turns on the fact that Mrs. Kieu's misrepresentations were made innocently, with no intent to deceive. Since in Texas an insurance company must prove the insured's intent to deceive to void a policy based on misrepresentation, the Fifth Circuit upheld the lower court's opinion. *Id.* at 892. Further, the trial court, as the sole finder of fact, found that the misrepresentations made by Mrs. Kieu were not material to the risk. Although Petitioner argued on appeal that this finding was clearly erroneous, the Fifth Circuit did not address the issue and thus did not overturn the trial court's finding. *Id.* at 889, n.5. Since the insurance company failed to prove that it relied on misrepresentations "material to the risk," (a necessary element of its case under either state or federal law) an independent ground exists on which to uphold the district court's opinion. Thus, even if the uberrimae fidei doctrine is applicable to these facts, Mrs. Kieu's verdict should be upheld since her misrepresentations were not material and were not relied on by the insurer. See *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 at 872 (2d Cir. 1985). (Even uncontradicted testimony on behalf of the insurance company that a risk is material need not be accepted by the trial court.)

UBERRIMAE FIDEI IS NOT ENTRENCHED FEDERAL PRECEDENT

The Fifth Circuit was correct in its analysis that the uberrimae fidei doctrine is not entrenched federal precedent which must be applied to all maritime insurance

disputes. Although the uberrimae fidei doctrine is recognized as part of the body of general maritime law, it has not been uniformly applied in recent years. *Anh Thi Kieu*, 927 F.2d, 888-890. In many cases where the doctrine has been applied, it has often been consistent with state substantive law; therefore, few cases have considered whether federal maritime law preempts state substantive law in this area. See *Albany Insurance Co. v. Wisniewski*, 579 F.Supp. 1004, 1014 (D.R.I. 1984). For example, most of the district and circuit court opinions discussing the uberrimae fidei doctrine have come from courts within the Second Circuit Court of Appeals. Since both New York state substantive law and federal maritime law embrace the uberrimae fidei doctrine, those opinions did not apply a *Wilburn Boat* preemption analysis. See *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9 (2nd Cir. 1986); *Puritan Ins. Co. v. Eagle S.S. Co.*, 779 F.2d 866 (2nd Cir. 1985); *Golden Eagle Liberia v. St. Paul Fire & Marine*, 685 F. Supp. 393 (S.D.N.Y. 1988); *Thebes Shipping, Inc. v. Assicurazioni Ausonia Spa*, 599 F.Supp. 405 (S.D.N.Y. 1984); *Constractor's Realty v. Insurance Co. of North America*, 469 F.Supp. 1287 (S.D.N.Y. 1979); *Anne Quinn Corp. v. American Manufacturers Mut. Ins. Co.*, 369 F.Supp. 1312 (S.D.N.Y. 1973). The Ninth Circuit recognized uberrimae fidei in one 1962 case only because the parties contractually stipulated to its applicability pursuant to British law. *Pacific Queen Fisheries v. Symes*, 307 F.2d 700, 706-709 (9th Cir. 1962). No recent Ninth Circuit case addresses this issue. Only two district court cases within the Ninth Circuit have discussed the issue. The *Wilburn Boat* analysis was not discussed in *Reliance Insurance Co. v. McGrath*, 671 F.Supp.

669 (N.D. Cal. 1987) since California state law still recognizes the uberrimae fidei doctrine in accordance with federal maritime law. Only one lower court case within the Ninth Circuit actually applied a preemption analysis and concluded that uberrimae fidei is entrenched federal precedent. See *Port Lynch Inc. v. New England Int'l Assurety of America, Inc.*, 754 F.Supp. 816, 822 (W.D. Wash. 1991). The Eleventh Circuit Court of Appeals has allowed parties to contract around the uberrimae fidei rule, despite its holdings in *Steelmet, Inc. v. Caribe Towing Corp.*, 747 F.2d 689, 695 (11th Cir. 1984) and *Kilpatrick Marine Piling v. Fireman's Fund Ins.*, 795 F.2d 940, 942 (11th Cir. 1986), indicating that it is no longer entrenched federal precedent in that circuit. *King v. Allstate Ins. Co.*, 906 F.2d 1537 (11th Cir. 1990). The Fifth Circuit has recognized but never applied the doctrine. *Anh Thi Kieu*, 927 F.2d at 889. As shown above, it has most often been applied where it was recognized by the state whose law controlled construction of the disputed insurance contract. Thus, while the uberrimae fidei rule is still part of the body of general maritime law, it is not so entrenched that it must be applied to the exclusion of state substantive law.[2] In fact,

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[2] Justice Johnson acknowledged that the uberrimae fidei doctrine is still viable in some cases: "But before we leave our discussion of the tug of war between federal and state law, we find it necessary to stress those decisions which we do *not* reach. This Court does not hold that federal maritime law no longer embraces the uberrimae fidei doctrine: while we have found no cases in this Circuit which apply the doctrine, we also have found no cases which expressly reject the doctrine. Neither does this Court hold that state insurance law always

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the uberrimae fidei doctrine has been abandoned in all areas of insurance *except* marine insurance as rigid and unfair. Justice Johnson correctly pointed out that the "sole remaining substantial vestige of the doctrine is in maritime insurance law." *Id.* at 888. Therefore, under *Wilburn Boat*, Texas state law should apply in this case, since no entrenched federal maritime rule exists and since the State of Texas has a substantial and legitimate interest in regulating insurance contracts.

NO NEED FOR UNIFORMITY AS TO UBERRIMAE FIDEI

Further, no valid reason exists to support the application of this inflexible rule to promote uniformity in the general maritime law. Although Petitioner urges that uberrimae fidei must be applied here to promote such uniformity, it gives no reason why the need for uniformity requires the application of this rule. Petitioner makes no contention that an admiralty court's rejection of the uberrimae fidei doctrine "would defeat the reasonably settled expectation of maritime actors," *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307, 318 (5th Cir. 1987), rev'd on other grounds, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988), or "impair the characteristic features of general maritime law." *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485 at 1492 (11th Cir. 1986). The problem of

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will supersede the uberrimae fidei doctrine. In an appropriate case, it is entirely possible that application of the doctrine would be more appropriate than application of the relevant state insurance regulations." *Anh Thi Kieu*, 927 F.2d 890.

misrepresentations in applications for insurance is not "essentially maritime in character, nor one peculiar to admiralty or maritime jurisdiction," but is one which is common to all contracts of insurance, whether they insure matters "ashore or afloat." *Id.* at 1491. The misrepresentation issue is of equal importance to all insurers, maritime and non-maritime alike. No good reason exist why maritime insurers should be favored with the uberrimae fidei doctrine over insurers of other interests. The original reason for the doctrine in maritime law, explained succinctly by the New York Court of Appeals, is no longer valid today:

> The reasons which brought into being the strict maritime insurance law doctrine as to disclosures go far back into the early days of marine insurance, when sailing ships in far away seas were insured in London by underwriters who could get no information except from the ship owners. *Stecker v. American Home Fire Assur. Co.*, 84 N.E.2d 797 (Ct.App.N.Y. 1949).

In today's world of airplanes, telephones, and telefax machines, the maritime insurer has the same opportunity to obtain and verify facts as do other insurers. In fact, in this case Albany's surveyor actually went to the vessel and observed its condition shortly after the inception of the policy. Albany can hardly argue that it had no opportunity to evaluate the materiality of any risk or verify any statements of its insured. Not surprisingly, although Petitioner devotes over two and a half pages of its brief to the need for uniformity in the general maritime law, it does not give one reason why the uberrimae fidei doctrine should be uniformly applied in maritime cases. Petitioner's argument that this doctrine should be uniformly

applied to promote "orderly conduct and development of the maritime commerce of the nation" (Petitioner's brief, p. 14) is simply unsupported by any logical reasoning.

Nor does this Court's opinion in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) require a reversal of the district court's opinion. In *Kossick* the court held that an employer's oral contract with a seaman for maintenance and cure should be construed in accordance with the general maritime law, rather than with the law of the State of New York where the contract was made. The *Kossick* court reasoned as follows:

> Considering that sailors of any nationality may join a ship in any port, and that it is the clear duty of the ship to put into the first available port if this be necessary to provide prompt and adequate maintenance and cure to a seaman who falls ill during the voyage, (citations omitted) it seems to us that this is such a contract as may well have been made anywhere in the world, and that the validity of it should be judged by one law wherever it was made . . . 365 U.S. at 741.

The Court stressed that maritime law does not always displace state law when significant state and local interests exist. *Id.* It distinguished the *Wilburn Boat* decision because it involved an issue with a less "salty flavor" i.e., an insurance contract on a houseboat located in Texas waters. *Id.* The facts at bar are like those in *Wilburn Boat* rather than like those in *Kossick*.

The Eleventh Circuit analyzed why the *Wilburn Boat* rule is still viable, despite the lack of uniformity it causes in admiralty law:

> *Wilburn Boat* has been sharply critized as inconsistent with the concept of admiralty as a body of uniform national law. See, e.g., *G. Gilmore & C. Black, The Law of Admiralty* 49 (2d ed. 1975). True, *Wilburn Boat* is anti-uniformity. It is an advised choice by the Supreme Court in favor of state regulation of insurance, including maritime policies, so long as no overriding admiralty rule exists or is formulated. 348 U.S. at 316-19, 75 S.Ct. at 371-73. The decision points to the long tradition of state regulation of insurance and refers to the complexities and difficulties of attempts to unify insurance law on a nationwide basis, id. at 319, 75 S.Ct. at 373, and of Congress's reluctance to interfere even as to maritime insurance. Id. at 321, 75 S.Ct. at 374. *Steelmet*, 779 F.2d at 1490.

Since there is no entrenched federal precedent and no need for uniformity in this area of the law, Respondent urges that the Fifth Circuit's application of Texas law is correct in the case at bar.

II

ARTICLE 21.16 WAS CORRECTLY INTERPRETED

Petitioner asserts that the Fifth Circuit incorrectly interpreted Article 21.16 of the Texas Insurance Code. It argues that the Court effectively substituted the word "and" for the word "or" in the sentence below after "material to the risk:"

> Any provision in any contract or policy of insurance issued or contracted for in this State which provides that the answers or statements made in the application for such contract or in the contract of insurance, if untrue or false, shall render the contract or policy void or voidable, shall be of no effect, and shall not constitute any defense

> to any suit brought upon such contract, unless it be shown upon the trial thereof that the matter or thing misrepresented was material to the risk *or* actually contributed to the contingency or event on which said policy became due and payable, and whether it was material and so contributed in any case shall be a question of fact to be determined by the court or jury trying such case. (Emphasis added). Tex. Ins. Code Ann. Art. 21.16 (Vernon 1981).

According to Petitioner, the Fifth Circuit is "requiring an insurer to prove misrepresentation of facts material to the risk *and* misrepresentation of facts which actually contribute to the casualty." (Petitioner's brief, p. 12). Petitioner bases its argument on the following sentence from the Fifth Circuit's opinion:

> Under Texas law, an insured's misrepresentations may invalidate the policy of insurance, but only if the misrepresentations contributed to the destruction of the insured property. Tex.Ins.Code Ann.Art. 21.16 (Vernon 1981.) *Anh Thi Kieu*, 927 F.2d at 887.

If anything, the above sentence may imply that only one prong of the "either, or" test is inquired of in Texas; it certainly does not imply that both prongs of the test must be satisfied by the insurer. Nevertheless, this sentence constitutes dicta, is not a direct holding, and is in and of itself a correct statement of Texas law.

The Fifth Circuit has previously construed the meaning of Article 21.16 consistently with the Texas Supreme Court's analysis in *Robinson v. Reliable Ins. Co.*, 569 S.W. 2d 28. In *Bettes v. Stonewall Ins. Co.*, 480 F.2d 92 at 95 (5th Cir. 1973) the Court stated that the test is disjunctive rather than conjunctive. The above sentence, plucked out

of context by Petitioner, does not indicate a departure from the Court's analysis in *Bettes* when it is read with the remainder of the opinion. Therefore, Petitioner's argument that a correction by this court of the Fifth Circuit's reading of Article 21.16 would necessitate that Petitioner's arguments on materiality to be decided below is without merit.

CONCLUSION

The Fifth Circuit correctly applied Texas state law to the marine insurance contract in this case. The uberrimae fidei doctrine does not constitute entrenched federal precedent. No reason exists why the doctrine should be uniformly applied to marine insurance contracts.

Further, the Fifth Circuit correctly interpreted Article 21.16 of the Texas Insurance Code.

Therefore, Respondent respectfully requests that Petitioner's Writ of Certiorari be denied.

Respectfully submitted,

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